**IN THE HIGH COURT OF DELHI**

**FAO No.874/03**

# Jagdish Lal Bhatia & Ors. ..... Appellants
through: Mr.C.P. Vig, Advocate

VERSUS

$ Madan Lal Bhatia & Anr. ..... Respondents
through: Mr.Subhash Verma and
S.K. Duggal, Advocates.

RESERVED ON: 15.11.2007

% DATE OF DECISION: 21.11.2007

**CORAM:**

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. This appeal is directed against the order dated 21.10.03 passed by the learned Additional District Judge, Delhi whereby petition filed by the respondent under Section 276 of the Indian Succession Act, 1925 was allowed and letters of administration were granted in favour of the respondent in respect of the will dated 6.2.1985 executed by Late Smt. Ram Lubhai.

2. Late Smt. Ram Lubhai (hereinafter referred to as the deceased) had 5 sons namely, Shri Chand Bhatia, Kishan

Chand Bhatia, Madan Lal Bhatia, Jagdish Lal Bhatia and Kundan Lal Bhatia and one daughter, Rawail Kumari. Deceased died on 4.3.1994. Three sons (Shri Chand, Kishan Chand, Kundan Lal) had pre-deceased her. Thus, at the time of her death, deceased was survived by her two sons Madan Lal and Jagdish, daughter Rawail Kumari and the legal heirs of her other three pre-deceased sons. Deceased was the owner of the property bearing Municipal No.26/67 West Patel Nagar, New Delhi and other movable properties such as cash, post office bonds, jewellery and house hold items etc.

3. Madan Lal Bhatia filed a petition under Section 276 of the Indian Succession Act, 1925 seeking probate of a will purported to have been executed by the deceased on 6th February, 1985. As per the will, the deceased had bequeathed her entire property in favour of Madan Lal to the exclusion of her other legal heirs including her son Jagdish Lal and daughter Rawail Kumari.

4. Jagdish Lal and 7 children of Late Sh. Kishan Chand (pre-deceased son of the deceased) had opposed the petition.

5. The will in question Ex.PW2/2 is a computer typed document and consists of 2 sheets. It has been typed in the English language. It bears the signatures of the deceased on each page. The signature has been appended in Gurmukhi script. The will in question is a registered document.

6. The will in question has been witnessed by one Mr.Bansi Lal Arora and one Mr.M.N. Sharma.

7. Bansi Lal Arora has been examined by the respondent as PW-2 to prove the will. In his examination-in-chief he deposed that he is the friend of the respondent. That he knew the deceased since the year 1972 and that he and the other attesting witness had attested the due execution of the will by the deceased. That the deceased along with the respondent had come to his office and expressed her desire to execute a will in favour of the respondent as the respondent was taking good care of her. Regarding preparation of the will he stated that the will Ex.PW2/2 was drafted by an advocate Mr.Sharma who is also the other attesting witness. That the will was drafted under the instructions of the deceased. That the will was then typed by a typist. (He could not recollect the name or whereabouts of the said typist). That after the will was fully typed, the contents of the will were read over to the deceased by the advocate in vernacular and thereafter deceased appended her signatures in Gurmukhi. That thereafter he signed the will as an attesting witness. That after the execution and attestation of the will, they went to the office of Sub-Registrar, Kashmere Gate, Delhi where the will was duly registered.

8. To prove the registration of the will in question, one

Mr.Shatrughan, LDC, Office of Sub-Registrar, Kashmere Gate, Delhi was examined as PW-1. He deposed that the will in question was registered on 6.2.1985. He also brought the necessary records to prove the same.

9. On the other hand, objectors/appellants i.e. Anoop Bhatia and Jagdish Lal Bhatia examined themselves as OW-1 and OW-2 respectively. In their respective testimony, they deposed that the deceased was not in a sound mental condition at the time of execution of the will. That being an old lady, deceased was suffering from various infirmities and could not even see or hear properly. That the deceased was an illiterate lady. That the deceased did not appear before the Sub-Registrar. That the will in question is a forged and fabricated document.

10. Apart from their own testimony, objectors have not led any evidence.

11. Considering the evidence led by both the parties, vide order dated 21.10.03 the learned Trial Court has held that the will dated 6.2.1985 was the last legal and valid testament of the deceased and thus granted letters of administration in favor of the respondent Madan Lal.

12. Aggrieved by the impugned order dated 21.10.03, objectors to the petition under Section 276 of the Indian Succession Act, 1925 filed by the respondent have filed the

present appeal.

13. In support of their objections, following grounds were urged by the objectors :- (Same grounds have also been urged in the present appeal)

A That the appellant was an illiterate lady therefore she could not have appended her signatures on the will.

B That the appellant being an old lady was suffering from various infirmities. At the time of the execution of the will, deceased was not in a sound mental condition and could not even see or hear properly. Thus, she was not capable of understanding the contents of the will and was also not in a position to appear before the Sub-Registrar..

C Since the alleged attesting witness Mr.B.L. Arora was a friend of the respondent, beneficiary under the will, not much importance/weightage can be attached to his testimony.

D Neither the typist who typed the will nor the advocate who drafted the will and also an attesting witness were produced and examined by the respondent.

E Disproportionate nature of bequest under the will is a circumstance casting heavy suspicion on the

genuineness of the will.

14. Section 2(h) of the Indian Succession Act, 1925 defines a will to mean the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

15. Judgment of this Court in the decision reported as *Vidya Sagar Soni v State & Ors* AIR 2006 Delhi 354 extensively dealt with the legal burden of proof when a will is propounded. What would constitute suspicious circumstances and what form of affirmative proof should be sought by the court to satisfy the judicial conscience that the document propounded is the last legal and valid testament. From a reading of the said decision, under-noted principles can be culled out :-

I The legal burden to prove due execution always lies upon the person propounding a will. The propounder must satisfy the judicial conscience of the court that the instrument so propounded is last will of a free and capable testator.

II The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by the law. The contestant opposing the will may bring material on record meeting such prima facie in which event the

onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. (see the decision of the Supreme Court in *Madhukar D. Shende v Tarabai Aba Shedge* AIR 2002 SC 637) I

III No specific standard of proof can be enunciated which must be applicable to all the cases. Every case depends upon its circumstances. Apart from other proof, conduct of parties is very material and has considerable bearing on evidence as to the genuineness of will which is propounded. Courts have to be vigilant and zealous in examining evidence. Rules relating to proof of wills are not rules of laws but are rules of prudence.

IV Expanding on the care and caution to be adopted by the courts, and presumptions to be raised, in the decision reported as (1864) 3 Sw & Tr. 431 *In The Goods of Geale*, it was opined that where a person is illiterate or semi literate or the will is in a language not spoken or understood by the executor, the court would require evidence to affirmatively establish that the testator understood and approved all the contents of the will.

V. One form of affirmative proof is to establish that the will was read over by, or to, the testator when he executed it. If a testator merely casts his eye over the will, this may not be sufficient.

VI Courts have to evaluate evidence pertaining to the circumstances under which the will was prepared. If a will is prepared and executed under circumstances which raise a well grounded suspicion that the executor did not express his mind under the will, probate would not be granted unless that suspicion is removed.

VII A word of caution. Circumstances can only raise a suspicion if they are circumstance attending, or at least relevant to the preparation and execution of the will itself.

VIII Another point that has to be considered is about the improbability in the manner in which the instrument is scripted. Instance of suspicious circumstances would be alleged signatures of testator being shaky and doubtful, condition of the testator's mind being feeble and debilitated, bequest being unnatural, improbable and unfair.

IX Suspicious circumstances are a presumption to hold against the will. Greater is the suspicion more

heavy would be the onus to be discharged by he who propounds the will.

X A will is normally executed by a person where he intends to alter the rule of succession or where he desires a particular form of inheritance and to that extent, nature of bequest is not of much substance to invalidate a will, but consistent view taken by the courts is that this could be treated as a suspicious circumstance. What weightage has to be attached to this suspicion would depend upon case to case.

XI Suspicion being a presumptive evidence, is a weak evidence and can be dispelled.

16. With regard to proof the Will, in the decision reported as *Madhukar D. Shende v Tarabai Aba Shedge* AIR 2002 SC 637 it was observed as under :-

> "8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will

> was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on week foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the Jury in ***R.*** v. ***Hodge*** 1838, 2 Lewis CC 227 may be apposite to some extent. "The mind was apt to make a pleasure in adapting circumstances to one another and even in straining them a title, if need be, to force then to form parts of one connected hole; and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicious or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict -- positive or negative.”

17. With the aforesaid understanding of the law, I will now consider the objections raised by the appellants to the will and the evidence on record.

18. With regard to ground 'A' i.e. deceased was an illiterate lady, it is relevant to note the respective pleadings of both the objectors.

19. Relevant portions of the objections filed by the appellant Jagdish Lal Bhatia read as under :-

> "PRELIMINARY OBJECTIONS :
> 1. That the present petition u/s 276 of the Indian Succession Act, for the grant of the letters of Administration, is not maintainable, because Shrimati Ram Lubhai had neither executed any Will nor she was a sound disposing mind in February, 1985 at the time of the alleged execution of the Will, and as such the alleged Will is a forged and fabricated document and have no legal or binding force in the eyes of law.
> .....
>
> On Merits
> .....
>
> 7. Para 7 of the petition is wrong and denied. It is wrong that deceased Shrimati Ram Lubhai left behind a registered Will dt. 6.2.1985, bequeathing the property in favor of the petitioner. The said Alleged Will dt.6.2.1985 is a forged and fabricated document, because on the one hand the said Shrimati was having no legal right over the said property and on the other hand she was not of the sound and disposing mind on 6.2.1985, and she could not execute any Will nor was in a position to execute and Will and it appears that petitioner had produced some fictitious person before the Sub Registrar who impersonated herself as Ram Lubhai, and got the alleged Will registered before the Sub-Registrar. The said Will being forged and fabricated document, has no force in the eyes of law.
> ....."

20. Relevant portion of the reply of the appellant Jagdish Lal to the reply filed by the respondent to the objections reads as under :-

> "REPLY TO THE PRELIMINIARY OBJECTIONS:

> 1. Para 1 of the reply to the preliminary objections as stated is wrong and hence denied. The Will in question is forged and fabricated document, and it was never executed by the deceased, and as such the present petition is wholly incompetent. The Will executed by late Shrimati Ram Lubhai is the forged and fabricated Will. The said Shrimati Ram Lubhai was not good sound disposing mind, and as such she could not execute any Will in February, 1985, and the present petition on the basis of forged and fabricated Will is not maintainable."

21. For the first time in the examination-in-chief by way of an affidavit the appellant Jagdish Lal Bhatia, OW-2 deposed that the deceased was an illiterate lady. Relevant portion of his examination-in-chief reads as under :-

> "5. That the said Smt. Ram Lubhai was not keeping good health and she never appeared before the office of sub registrar in connection with the registration of the said Will because whenever she did anything, she used to consult me and she never told me about the execution of the Will and the Petitioner has colluded with the attesting witnesses of the said Will with the object to grab the property in dispute and as such, the said Will is forged, fabricated and void document. My mother was an illiterate and she could not read or write and she was suffering from various old aged diseases as such, the question of execution of any Will by the deceased Smt. Ram Lubhai does not arise."

22. Noting the pleadings of other appellants/objectors, relevant portion of their objection petition reads as under :-

> "1. That the Will of late Smt. Ram Lubhai is an act of forgery. Smt. Ram Lubhai had lost all her senses and was not capable of understanding the contents of the Will. It is an act of manipulation and forgery made by the petitioner with malafide intentions and the

same is not binding on the objectors herein.

23. Taking cue from his uncle Jagdish Lal Bhatia, objector Anoop Kumar Bhatia,OW-1 also deposed about the illiteracy of the deceased for the first time in his examination-in-chief. Relevant portion of his examination-in-chief reads as under :-

> ".....Smt. Ram Lubhai, our grand-mother was aged about 90 years at the time of her death on 5.3.2004. She was illiterate. She was unable to move. She could not hear anything. Our grand-mother used to reside with her sons at their respective houses, from time to time. Smt. Ram Lubahi had not executed any will. The Will Ex.PW2/2 is a forged and fabricated Will and was never executed by Smt. Ram Lubhai."

24. It is well settled that a party can be permitted to adduce evidence on the basis of the case of pleaded by him in his pleading. In the decision reported as *Abubakar v Harun* AIR 1996 SC 612, the Supreme Court has observed as under :-

> ".....No amount of proof can substitute pleadings which are the foundation of the claim of a litigating party....."

25. Therefore, the plea of the objectors that the deceased was an illiterate lady cannot be considered for the reason said plea was not raised in the pleadings of the objectors but was for the first time introduced in their evidence.

26. However for the discussion here-in-after literacy of the executant becomes irrelevant for if it is otherwise shown that she executed the will fully conscious of it and after

understanding the same, the will shall stand.

27. With regard to the ground 'B' i.e. that the deceased was an infirm lady at the time of the execution of the will, suffice would it be to note that the appellants have not led any positive evidence to establish the same. Two facts which according to the learned Trial Court have tilted the scale in the favor of the respondent and in my opinion rightly so are (i) evidence that the deceased used to visit one 'Guruji' around the time of the execution of the will and (ii) that the deceased died 9 years after the execution of the will.

28. In the decision reported as *Ramabai Padmakar Patil v Rukminibai Vishnu Vekhande* AIR 2003 SC 3109 with regard to the similar ground raised by the objectors therein, the Supreme Court has observed as under :-

> “9. .....The fact that Smt. Yamunabai was hard of hearing or that she was unable to walk does not lead to an inference that her mental faculties had been impaired or that she did not understand the contents of the document which she was executing. It is important to note that Smt. Yamunabai personally came to the office of the Sub-Registrar and her death took place after a considerable period i.e. 3 years and 9 months after the execution of the Will. No evidence has been adduced by the defendants to show that at the time of the execution of the Will she had been suffering from any such ailment which had impaired her mental faculties to such an extent that she was unable to understand the real nature of the document which she was executing. We are, therefore, clearly of the

> opinion that the finding recorded by the learned District Judge, which has been affirmed by the High Court in second appeal, is not based upon a correct application of legal principles governing the proof and acceptance of Will and the same is completely perverse. The aforesaid finding is accordingly set aside. The finding recorded by the trial Court that the Will is genuine is hereby restored"

29. Pertaining to ground 'C' i.e. that the attesting witness who proved the will is an interested witness, it is relevant to note the observations of the Supreme Court in the decisions reported as *Rabindra Nath Mukherjee v Panchanan Banerjee* AIR 1995 SC 1684 and *Madhukar D. Shende v Tarabai Aba Shedge* AIR 2002 SC 637.

30. In the *Rabindra's* case (supra), the Supreme Court has observed as under :-

> "6. Insofar as the third circumstance is concerned, we may first observe that witnesses in such documents verify whether the same had been executed voluntarily by the concerned person knowing its contents. In case where a will is registered and the Sub-registrar certifies that the same had been read over to the executor who, on doing so, admitted the contents, the fact that the witnesses to the document are interested loses significance. The documents at hand were registered and it is on record that the Sub-registrar had explained the contents to the old lady. So, we do not find the third circumstance as suspicious on the facts of the present case"

31. In the *Madhukar's* case (supra), the Supreme Court has observed as under :-

“10. The two attesting witnesses on account of being known to Chingubai's son, being his classmates, were known to the family, and therefore, were natural witness to be called to attest the execution of will. On account of their acquaintance with the family, they could have naturally known and identified the executant. Merely because of being classmates they would be interested in obliging their classmates mother so as to benefits her and go to the extent of falsely deposing is too far fetched an inference to draw.....”

15. Other reasoning of the trial court and the first appellate Court, for holding the will not proved, too to say the least, verge on absurdity. Bhagubai died a day after the execution and registration of the will. There is nothing to show that Bhagubai was physically or mentally incapacitated from executing the will. On the one hand, the courts below have questioned the propriety of the Sub-Registrar having come to the house of Bhagubai for registering the will on the ground as to why Bhagubai could not have gone to the office of Registrar on an assumption that she was fit to do so and yet the mental capacity of Bhagubai to execute the will have been doubted. The two attesting witnesses have been held to be 'interested' on the ground of their being classfellows of Chingubai's son and on the other hand, it has been doubted whether they would have known and identified the executant. There is nothing to doubt the mental and physical capacity of Bhagubai but the same has been suspected because of "complete absence of any medical evidence, of a doctor which would show that the testator was in a sound and disposing stare of mind". There is no rule of law or of evidence which requires a doctor to be kept present when a will is executed. In short, the courts below have allowed their findings to be influenced by such suspicion and conjectures as have no foundation in the evidence and have no relevance in the facts and circumstances of the case and unwittingly

> allowed their process of judicial thinking to be vitiated by irrelevant reasoning and considerations. The weighty factor that the factum of execution of will by Bhagubai was being denied by a rank trespasser without raising any specific pleadings and the fact that no relation of Bhagubai has chosen to lay a challenge to the will, have been simply overlooked. In our opinion, the High Court ought not to have sustained such a perverse finding which would result in the property of a rightful owner being lost to a trespasser."

32. From the afore-noted two decisions, the legal principle which emerges is that if there is nothing unnatural about the will and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition.

33. In so far as ground 'D' pertaining to non-examination of typist and advocate is concerned, suffice would it be to note the following observations of the Supreme Court in Ramabai's case (supra) :-

> "9. The learned District Judge has observed that Smt. Yamunabai was very old when she executed the Will and she was hard of hearing and was unable to walk. He further observed that Chhaya Dighe who typed the Will and one Shri Tiwari, Advocate, who was present at the time of preparation and execution of the Will, were not examined and these facts together created a doubt regarding the authenticity of the Will. As discussed earlier, in view of Section 63 of Indian Succession Act and the proviso to Section 68 of the Evidence Act, the requirement of law would be fully satisfied if

> only one of the attesting witness is examined to prove the Will. That this had been done in the present case by examining PW2 Raghunath Govind Sogale cannot be disputed. No infirmity of any kind had been found in the testimony of this witness. Chhaya Dighe merely typed the Will and she is not an attesting witness nor it is anybody's case that Smt. Yamunabai had put her thumb impression on the Will in her presence, therefore, her examination as a witness was wholly redundant. The mere non examination of the Advocate who was present at the time of preparation or registration of the Will cannot, by itself, be a ground to discard the same.....”

34. As already noted, disproportionate bequest at best is a circumstance casting suspicion upon the genuineness of the will. However, said suspicious circumstance can be repelled by adducing evidence.

35. In the instant case, the reason given by deceased for bequeathing her entire property in favour of the respondent is that she was residing with the respondent and that the respondent was taking good care of her. It has been admitted by the objectors also that the deceased was residing with the respondent.

36. There is also history of bad relations in the family evidenced by the fact that the deceased was in litigation with her son Late Sh Kishan Chand Bhatia over the ownership of the property which is the subject-matter of the probate petition i.e. House no.26/67, West Patel Nagar, Delhi.

37. It is also pertinent to note that no challenge has been laid to the will by the other legal heirs of the deceased including her daughter Smt. Rawail Kumari.

38. In the decision reported as *S.Sunderasa Pai v Sumangala T. Pai* AIR 2002 SC 317, the Supreme Court has held that the uneven distribution of assets amongst children by itself, cannot be taken as a circumstance causing suspicion surrounding execution of the will. It was further observed :-

> "5..... It is significant to note that only the plaintiff has questioned the Will. All the defendants were supporting the Will. The High Court also found that in view of testimony of the attesting witness, the Will had been formally roved. Under these circumstances, we fail to understand how the conclusion about the Will being unnatural on the basis of uneven distribution of the assets by Indira Bai could be reached.....".

39. In the decision reported as *Vilas Pandurang Patil v State of Maharashtra* (2004) 6 SCC 158 said, it was observed as under:-

> "18. .....It is true that when on the evidence brought on record two views are possible and the court has taken a view which is possible, interference by the appellate court would not be proper.....".

40. In view of the above discussion, I hold that the impugned order dated 21.10.03 does not suffer from any legal infirmity.

41. The appeal is thus dismissed.

42. No costs.

43. LCR be returned.

November 21, 2007 PRADEEP NANDRAJOG
sl (JUDGE)